

EXHIBIT P

11-15-06 Transcript.txt

1

6BFHSTOA

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----X

3 STORM, LLC,

4 Plaintiff,

5 v.

06 Civ. 13157 (GEL)

6 TELENOR MOBILE COMMUNICATIONS AS,

7 Defendant.

8 -----X

9
10 New York, N.Y.
10 November 15, 2006
11 10:10 a.m.

12 Before:

12 HON. GERARD E. LYNCH

13 District Judge

14 APPEARANCES

15 LOVELLS

16 Attorneys for Plaintiff

16 BY: PIETER VAN TOL

17 LISA J. FRIED

17 ERIC Z. CHANG

18 GONZALO ZEBALLOS

19 ORRICK HERRINGTON & SUTCLIFFE, LLP

19 Attorneys for Defendant

20 BY: ROBERT L. SILLS

20 KAREN D. THOMPSON

21 ALISON F. SWAP

22
23
24
25 SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

2

6BFHSTOA

1 (In open court)

2 THE COURT: Good morning.

3 This is Storm, LLC v. Telenor Mobile Communications.

4 Who do I have in front of me?

5 MR. VAN TOL: Good morning, your Honor. My name is
6 Pieter Van Tol, from Lovells, representing Storm, the
7 petitioner.

11-15-06 Transcript.txt

8 THE COURT: Good morning, sir.
 9 MR. VAN TOL: Good morning.
 10 I should introduce my colleagues. Lisa Fried is to my
 11 right; Eric Chang is to her right; Gonzalo Zeballos is to the
 12 right again, all from the Lovells firm.
 13 THE COURT: Good morning to all.
 14 MR. SILLS: Your Honor, I'm Robert Sills, of Orrick
 15 Herrington & Sutcliffe, on behalf of Telenor Mobile
 16 Communications. With me are my colleagues Karen Thompson and
 17 Alison Swap.
 18 THE COURT: Good morning to all of you.
 19 It is Mr. Van Tol who brings us here this morning,
 20 but, Mr. Sills, it is you who brings us here to federal court.
 21 I have not seen a copy of the notice of removal. The
 22 plaintiff didn't have one, I believe, at the time that this
 23 order to show cause was brought before me. When I tried to
 24 find it on ECF, it seems it hasn't been posted yet.
 25 Can you tell me, why do I have jurisdiction here?
 SOUTHERN DISTRICT REPORTERS, P. C.
 (212) 805-0300

3

6BFHST0A

1 MR. SILLS: Yes, your Honor. Because this is an
 2 international arbitration. The underlying dispute that is
 3 being arbitrated is between my client, a Norwegian corporation,
 4 Mr. Van Tol's client, a Ukrainian limited liability company,
 5 concerning their rights as shareholders in a Ukrainian
 6 corporation known as Kyivstar that has operations throughout
 7 Ukraine. Therefore, the arbitration agreement and the contract
 8 itself arise under the New York Convention and under Chapter 2
 9 of the Arbitration Act, which is 9 U.S.C. 201 et seq. There is
 10 jurisdiction. There is removal jurisdiction under, I believe,
 11 Section 207 of the Act.
 12 THE COURT: There is something special about
 13 international arbitration that gives federal jurisdiction?
 14 MR. SILLS: There is indeed, your Honor. The United
 15 States is a party to the New York Arbitration Convention of
 16 1958, as is virtually every other country. Pursuant to Chapter
 17 2 of the Arbitration Act, and I have actually brought the
 18 statute here with me if your Honor would like, that is enacted
 19 as positive law by Congress.
 20 Unlike Chapter 1 of the Arbitration Act, which does
 21 not confer subject matter jurisdiction, although it does
 22 prescribe a substantive rule of law, that creates original
 23 jurisdiction in this court over any dispute, and it is Section
 24 202. It says: An arbitration agreement or arbitrable award
 25 arising out of a legal relationship, whether contractual or
 SOUTHERN DISTRICT REPORTERS, P. C.
 (212) 805-0300

4

6BFHST0A

1 not -- although this one is -- which is considered as
 2 commercial, including a transaction, contract, or agreement
 3 described in Section 2 of this title, falls under the
 4 Convention, and that is this treaty, the New York Arbitration
 5 Convention. An agreement or award arising out of such a
 6 relationship which is, and there is an exception for disputes
 7 between citizens of the United States, the remainder of, and
 8 then the following section says: An action or proceeding
 9 falling under the Convention shall be deemed to arise under the
 10 laws and treatise of the United States. The district courts of
 11 the United States shall have original jurisdiction over such an
 12 action or proceeding regardless of the amount in controversy.

11-15-06 Transcript.txt

13 Then Section 205 makes any case related arising under
 14 the Convention in state court removable to this court at any
 15 time prior to judgment.
 16 THE COURT: OK. Sounds like that will do.
 17 Mr. Van Tol, I understand you don't dispute the
 18 jurisdiction of the court. Of course, I have to satisfy myself
 19 that I do have jurisdiction, but he is right you're saying.
 20 MR. VAN TOL: Yes, your Honor. I agree that he is.
 21 THE COURT: Then let's turn to the merits of the
 22 argument.
 23 I certainly can't say I have read all the documents,
 24 but I have read really all of the materials submitted in
 25 connection with the declaration of Ms. Fried, which includes
 SOUTHERN DISTRICT REPORTERS, P. C.
 (212) 805-0300

5

6BFHSTOA
 1 the affirmations and briefing that were submitted to the state
 2 court. I have reviewed the arbitrators' decision on
 3 jurisdiction, although for some reason pages 2 through 6 seem
 4 to be missing from my copy. But I have read what is there. So
 5 I have some familiarity with the plaintiff's position.
 6 Mr. Van Tol, I think you can be brief, but why don't
 7 you start by taking a few minutes to state the main points of
 8 your argument.
 9 MR. VAN TOL: Thank you, your Honor. I will be brief.
 10 Really, the key consideration here on the motion for a
 11 TR0 is irreparable harm, much as it is on an injunction. What
 12 we have put before you are two cases that I think really answer
 13 this question. They are on all fours. That is the Castlewood
 14 case, very recently decided, and also the Tellium case, which
 15 was decided by Judge Buchwald in 2004.
 16 What those cases said, your Honor, is that it is per
 17 se harm where you have a party in my client's situation which
 18 is being forced to arbitrate where that party has an argument
 19 that no arbitration agreement exists.
 20 THE COURT: But of course you are not forced to
 21 arbitrate until December the 7th, is it?
 22 MR. VAN TOL: Yes, your Honor.
 23 What those cases make clear is they are not talking
 24 about appearing at a hearing, they are talking about every day
 25 that you are expending attorneys' fees preparing for a hearing,
 SOUTHERN DISTRICT REPORTERS, P. C.
 (212) 805-0300

6

6BFHSTOA
 1 because in those cases the hearing was off in the future, that
 2 is per se harm. The Maryland Casualty case, which is a Second
 3 Circuit case, said that harm is not compensable by, say, an
 4 award of attorneys' fees.
 5 THE COURT: As a realistic matter, though, you have
 6 this dispute with them, right?
 7 MR. VAN TOL: We do, your Honor.
 8 THE COURT: And it is going to have to be adjudicated
 9 somewhere.
 10 MR. VAN TOL: We believe in court. Yes, your Honor.
 11 THE COURT: In this court, for example, or in an
 12 American court?
 13 MR. VAN TOL: In two stages, your Honor. The first
 14 would be in this court to find that there is no contract so
 15 there is no arbitration to be had. So you could permanently
 16 enjoin the arbitration. Then it is our anticipation that we
 17 have the facts to move rapidly for summary judgment before your

11-15-06 Transcript.txt

18 Honor.

19 Of course, it is always at Telenor Mobile's option to
20 go to the Ukraine, which would seem like a logical place to go
21 to address Ukrainian law options, and they have always had that
22 option.

23 THE COURT: Of course, wherever you go there will have
24 to be discovery, right? So a lot of what is going on now -- I
25 took it that what the arbitrators were telling people to do at

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

7

6BFHSTOA

1 the moment is to finish their discovery.

2 MR. VAN TOL: Not necessarily, though, your Honor.

3 That was my point about summary judgment.

4 Here, there really are issues of law. If there is no
5 contract, not only is the arbitration permanently enjoined,
6 Mr. Sills' claims almost in toto are barred.

7 The only claim that might be left -- it wouldn't even
8 be left. The noncompete claim arises under the contract. It
9 is not as if, your Honor, he is bringing tort claims outside
10 the contract. If you as a matter of law find that a contract
11 does not exist, that is the end of the story.

12 THE COURT: Well, but under American law the question
13 of the arbitration, the validity of the arbitration clause, is
14 a question of severability, is it not?

15 MR. VAN TOL: It is, your Honor. What you would do in
16 that respect is -- fortunately for I would think the court's
17 benefit the Ukrainian courts have addressed severability.

18 THE COURT: Have they?

19 MR. VAN TOL: Yes, your Honor, especially in this most
20 recent clarification, which is at Tab 21 of Ms. Fried's
21 declaration.

22 The Ukrainian court in the clarification took head on
23 the arbitration tribunal's finding on severability and said,
24 essentially, you disregarded what we said. In the Ukrainian
25 court's decisions they said the agreement is void, including

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

8

6BFHSTOA

1 the arbitration clause. Now, that is addressing severability.

2 To the extent there was any doubt --

3 THE COURT: Let's start with that.

4 MR. VAN TOL: Yes, your Honor.

5 THE COURT: Was that actually litigated in the
6 Ukrainian court?

7 MR. VAN TOL: It was, your Honor. Yes.

8 That was another point that the tribunal either
9 overlooked or disregarded. The parties brought up the
10 existence of this New York arbitration. Storm was then
11 defending a suit against another company, Alpren, and said,
12 wait a minute, there is an arbitration going on here. They
13 raised the clause. So it was at least implicit and probably
14 explicit in the original orders that the Ukrainian courts
15 focused in on severability and said, no, the clause itself is
16 void.

17 THE COURT: Let's try to be clear, because I don't
18 fully understand what was going on in the Ukraine.

19 There is this shareholders' agreement, whether it is
20 void or not, and Telenor has sought arbitration against Storm
21 with respect to alleged breaches of that agreement. That is
22 what is going on here in New York.

11-15-06 Transcript.txt

23 MR. VAN TOL: Correct, your Honor.
24 THE COURT: So who sued you about what in Kyiv?
25 MR. VAN TOL: In Kyiv, Alpren, which is a shareholder
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

9

6BFHST0A

1 of Storm, sued and said, you, Storm -- the person who signed
2 the agreement, Mr. Nilov, did not have authority to enter into
3 the shareholders' agreement. That is the basis of the
4 arbitration here.

5 In the course of those proceedings, Storm argued, no,
6 there is a valid agreement or it should be arbitrated in New
7 York. Storm argued that in the Ukraine.

8 THE COURT: What is it that should be arbitrated in
9 New York, in the sense that -- I don't know what Alpren is
10 trying to do. Was Alpren there trying to enjoin this
11 arbitration?

12 MR. VAN TOL: No, your Honor. It was there trying to
13 avoid the shareholders' agreement.

14 THE COURT: So it is sort of a declaratory judgment
15 action that says this purported shareholders' agreement should
16 be declared void.

17 MR. VAN TOL: Yes, your Honor.

18 THE COURT: Now, if Alpren wins that, what are the
19 legal consequences?

20 MR. VAN TOL: That is exactly the point, your Honor.
21 Under Ukrainian law, the legal consequence of voiding an
22 arbitration agreement is that --

23 THE COURT: Is that what this suit was all about in
24 the Ukraine?

25 People could have all kinds of reasons to think that a
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

10

6BFHST0A

1 contract should be voided, and there are all kinds of legal
2 obligations that you might have towards Alpren. I am not sure
3 that is the same thing as whatever obligations you have towards
4 Telenor, or maybe it is. I just don't understand what is
5 actually being sued about in the Ukraine.

6 MR. VAN TOL: Then I need to explain it better, your
7 Honor.

8 Actually, what the court found was the shareholders'
9 agreement was null and void. It then said, as a consequence of
10 Ukrainian law, the arbitration clause ipso facto falls away. I
11 can read to you from the clarification order, Tab 21.

12 THE COURT: Yes.

13 MR. VAN TOL: I don't know if you have it, but it says
14 in that first paragraph that the arbitration clause contained
15 therein, as its integral part, is also void and invalid.

16 Then it goes on to explain that under Article 216 of
17 the Ukrainian Civil Code --

18 THE COURT: I am just trying to get everything. In
19 the beginning it says, including the arbitration agreement,
20 included in the form of an arbitration clause, is null and
21 void. I see. Down below.

22 MR. VAN TOL: Yes, your Honor. Then it goes on to
23 say: This follows by operation of Ukrainian law.

24 Under Article 216 of the Ukrainian Code, civil code,
25 when you void an agreement, it means there are no other legal
SOUTHERN DISTRICT REPORTERS, P. C.

(212) 805-0300

Page 5

11-15-06 Transcript.txt

11

6BFHST0A

1 consequences other than its invalidity. In other words, the
 2 whole agreement, including the arbitration clause, has to fall
 3 by operation of law.

4 The Ukrainian court said that in their April order,
 5 they said it in their May order, and here in the clarification
 6 order they're saying if there is any doubt, here's expressly
 7 what we are saying.

8 THE COURT: I thought I saw somewhere in these papers
 9 a suggestion that Telenor had participated in some way in the
 10 appeal in the Ukraine. Is that mistaken?

11 MR. VAN TOL: Not in this case, your Honor. It is our
 12 position that they had the option to participate in the appeal.
 13 They did not in this appeal. But in other collateral
 14 litigation in the Ukraine they have appeared on appeals and on
 15 other matters.

16 THE COURT: So your position is whether or not they
 17 had notice or an opportunity to be heard in the trial level in
 18 the Ukraine in this case, they had the opportunity, you
 19 maintain, to intervene, at least so as to participate in this
 20 appellate process.

21 MR. VAN TOL: Yes, your Honor. It is even more than
 22 us maintaining that point. We introduced expert evidence at
 23 the arbitration hearing, which was un rebutted, to that effect.

24 If I may, in another collateral litigation, well after
 25 the fact, Telenor Mobile went into the court and pursued the

SOUTHERN DISTRICT REPORTERS, P. C.
 (212) 805-0300

12

6BFHST0A

1 very same clarification procedure that Storm did. So the
 2 Ukrainian courts give you several bites at the apple. And
 3 Telenor Mobile, for reasons that are unknown to us, has not
 4 chosen to avail itself of those.

5 Your Honor, sticking with the clarification order, if
 6 you are on the second page, it gets pretty express. It even
 7 goes on to say that the ongoing arbitration in New York is
 8 illegal under Ukrainian law.

9 My client is a Ukrainian corporation. By virtue of
 10 the tribunal's ruling on October 22nd, they are forcing us to
 11 act contrary to the courts that oversee us.

12 THE COURT: Is there some criminal or civil penalty
 13 for participating in unauthorized arbitrations in the Ukraine?

14 MR. VAN TOL: Well, your Honor, the one very real
 15 effect it has is that who knows what effect the arbitration
 16 award is going to have. It looks like under the case law we
 17 have cited that it itself will be null and void. So it will be
 18 a waste of time, your Honor.

19 THE COURT: There is that, yes. But it is not quite
 20 the same thing as somebody's forcing you to do an act that puts
 21 you in legal jeopardy back home.

22 MR. VAN TOL: Correct, your Honor. The cases don't
 23 say you need to be violating --

24 THE COURT: I understand that. I am just saying that
 25 the point that you make, sort of as an afterthought, I think,

SOUTHERN DISTRICT REPORTERS, P. C.
 (212) 805-0300

13

6BFHST0A

1 in the papers, that somehow you are being pushed to do
 2 something that is illegal, as you just put it, according to the
 3 courts that supervise you, it certainly is not clear to me that

11-15-06 Transcript.txt

4 under American law if the court said this arbitration is null
5 and void and the arbitrators went ahead anyway and you
6 participated under protest that you would be violating
7 anything. Now, Ukrainian law may be different, but you are not
8 citing anything to me that says that there is.

9 MR. VAN TOL: You are right. The bigger point,
10 obviously, is that we are afraid that even if we participate,
11 that whoever gets an award, it will be just a waste of the
12 parties' time.

13 So what we are really telling the court now is, we are
14 not talking about a delay of months and months nor are we
15 necessarily telling you when you need to decide. But this is a
16 matter that could be resolved in a few weeks.

17 There is no magic to the December 7th or 8th hearing
18 date. It was put off several times. All we're asking is that
19 the tribunal stay its hands for a very short period of time so
20 that we know we are in the right forum.

21 THE COURT: All right. I think I have the point.

22 MR. VAN TOL: Thank you, your Honor.

23 THE COURT: Mr. Sills, a couple of things. First of
24 all, where is the fire? Why can't we just all agree to
25 postpone this December 7th hearing until this matter gets

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

14

6BFHST0A

1 sorted out?

2 MR. SILLS: Because of the importance, your Honor, of
3 the underlying issues in the arbitration.

4 THE COURT: Tell me what they are.

5 MR. SILLS: If I could speak to that for a moment.

6 My client originally controlled all of Kyivstar, which
7 is the largest cell phone company in Ukraine, and it has a
8 market value of about \$8 billion. At some point Alfa Group,
9 which is a large Russian conglomerate controlled by one of the
10 Russian oligarchs, Michael Friedman, became interested in
11 investing in that company. There was a series of negotiations
12 in which Mr. Friedman was trying to buy up to a 40 percent
13 interest. That is critical as a matter of Ukrainian corporate
14 law because that gives important veto and blocking rights to
15 the holder of the shares.

16 As a condition of allowing that purchase of shares in
17 this extremely valuable company, the parties entered into an
18 elaborate negotiated shareholder agreement. It is annexed to
19 the papers.

20 It provides, among other things, that the Alfa Group,
21 which is the sole shareholder of Storm and, for that matter,
22 the sole shareholder of Alpren, the plaintiff in the supposed
23 litigation in the Ukraine, which I will get to in a moment,
24 would not boycott board of directors' meetings, it would not
25 boycott shareholders' meetings, and would cooperate in good

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

15

6BFHST0A

1 faith in the corporate governance to avoid paralysis of the
2 operations of this company.

3 Alfa, which is notorious throughout Russia, and really
4 throughout the world, for its extremely aggressive business
5 tactics and actually is the subject of two unrelated RICO
6 actions right here in this court --

7 THE COURT: Then it was pretty dumb of you to enter
8 into an agreement with them, wasn't it?

11-15-06 Transcript.txt

9 MR. SILLS: Hindsight is always 20/20, your Honor.
 10 THE COURT: Foresight is pretty good too. If you are
 11 going to make sort of allegations that there are big bad wolves
 12 out there, that is fine. I don't know that I can decide a case
 13 based on what you think about Russian oligarchs. But these are
 14 guys that you got in bed with so you don't have to tell me too
 15 much more about how evil they are. Let's just get ahead with
 16 what are the issues in this arbitration.
 17 MR. SILLS: I will move on, your Honor, except to note
 18 only that they were on a charm offensive at the time.
 19 For several years they did in fact comply with their
 20 obligations under the agreement, and then as part of what
 21 appears to be a campaign to get greater rights stopped coming
 22 to board meetings, stopped coming to shareholder meetings, and
 23 caused very serious damage to the company. At the same time
 24 they began an assault on the corporate charter in the courts of
 25 Ukraine, arguing that they were entitled under various theories
 SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

16

6BFHSTOA
 1 of Ukrainian law to equal rights, even though they only had
 2 approximately 45 percent of the shares in the company.
 3 In response, we initiated this arbitration back in
 4 February. This arbitration has had nothing but delay, your
 5 Honor. What we are trying to do is to get the company back on
 6 an even keel -- to get the board of directors functioning, to
 7 hold shareholders' meetings, to amend the charter to conform to
 8 the shareholders' agreement.
 9 The shareholders' agreement, which is expressly
 10 governed by New York law, provides that the shareholders'
 11 agreement trumps the charter and that the charter has to be
 12 conformed to the shareholders' agreement to maintain the
 13 governance scheme, in which my client has five out of the nine
 14 directors on the board, has the right to appoint the president
 15 of the company, and has a controlling share.
 16 THE COURT: You have a majority interest?
 17 MR. SILLS: We have 56.5 percent of the company, your
 18 Honor.
 19 THE COURT: The big bad wolf has 40.
 20 MR. SILLS: Approximately 43.5 percent.
 21 THE COURT: So essentially all the rest.
 22 MR. SILLS: They are the only two shareholders, your
 23 Honor.
 24 THE COURT: Mr. Van Tol's client is the unfortunate
 25 ward of you two folks. In other words -- who is really on the
 SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

17

6BFHSTOA
 1 other side of this arbitration, I am trying to figure out. You
 2 are suing the corporation that you have a majority interest in?
 3 MR. SILLS: No, your Honor.
 4 THE COURT: I'm sorry.
 5 MR. SILLS: We are suing Storm, the other shareholder.
 6 THE COURT: Storm is --
 7 MR. VAN TOL: Of Kyivstar, your Honor.
 8 THE COURT: Of Kyivstar.
 9 MR. SILLS: I apologize, your Honor.
 10 THE COURT: It is not your fault. I just am slow on
 11 these things.
 12 So Storm is Alpren is Alfa.
 13 MR. SILLS: That is exactly right.

11-15-06 Transcript.txt

14 THE COURT: Kyivstar is the company that you jointly
15 own.

16 MR. SILLS: Precisely.

17 THE COURT: So you sought arbitration against the
18 other party to the shareholders' agreement. I think I have it.

19 MR. SILLS: Exactly, your Honor, in order to compel
20 them to comply with the express terms of the shareholders'
21 agreement that they signed. That was back in February.

22 THE COURT: Who is the person who, according to the
23 Ukrainian courts, didn't have the authority to enter this
24 agreement?

25 MR. SILLS: Your Honor, it is a gentleman named
SOUTHERN DISTRICT REPORTERS, P. C.

(212) 805-0300

18

6BFHST0A

1 Valeriy Nilov. He was, and it is undisputed, the general
2 director, the chief executive officer of Storm. He was also an
3 executive of Alfa Group, which controls Storm.

4 There is no dispute that that is his signature and the
5 seal of the company on this agreement. In fact, your Honor, at
6 the time the agreement was signed, two estoppel certificates
7 were delivered to my client.

8 I can hand them up if you'd like.

9 THE COURT: Sure. OK.

10 MR. SILLS: Those were delivered attesting to
11 Mr. Nilov's authority to sign this agreement, your Honor. That
12 was some years ago.

13 Because it was a condition of allowing Alfa Group to
14 buy into the company, following that, shares were sold by my
15 client to Alfa Group. They were allowed to buy into this
16 blocking position. The parties amended the charter to conform
17 to the new realities of the new shareholder arrangement. The
18 parties operated under this agreement for a while and then
19 there was a change in character, a change in business plans,
20 and, in effect, this corporate war broke out in the Ukraine.

21 THE COURT: What are you asking the arbitrators to do,
22 what relief?

23 MR. SILLS: We are asking in terms of governance, your
24 Honor, for three principal heads of relief.

25 First, we are asking that the provision, the express
SOUTHERN DISTRICT REPORTERS, P. C.

(212) 805-0300

19

6BFHST0A

1 provision of the shareholders' agreement, that the nominees of
2 Storm, that is, the nominees of Alfa, attend board meetings.
3 Because the board cannot act without a quorum, and under the
4 corporate charter, so long as they boycott the meetings, the
5 board can't act and it can't conduct the ordinary business of
6 the board -- appointing executives, approving budgets, and so
7 on.

8 We are asking that they be directed, as they expressly
9 promised to do in the shareholders' agreement, to attend
10 shareholders' meetings, including the annual meeting of the
11 company, and, as with any company, it is important to hold
12 shareholders' meetings to conduct the business of the company.

13 Third, we are asking that the charter be amended. The
14 shareholders' agreement governed by New York law expressly
15 provides that in the event of any conflict between the charter,
16 the governance scheme of the shareholders' agreement which
17 gives control of the company to my client, that the parties
18 will cooperate in amending the charter so as to conform to the

11-15-06 Transcript.txt

19 shareholders' agreement.
 20 THE COURT: Now, when they give you the finger, what
 21 are you going to do about it? You win the arbitration and they
 22 say, sorry, but that's New York and we're not interested.
 23 Unlike an award of damages, which at least conceivably, not
 24 knowing where the assets of Storm are, could be enforced
 25 somewhere else in the world, aren't all of these forms of
 SOUTHERN DISTRICT REPORTERS, P. C.
 (212) 805-0300

20

6BFHSTOA

1 relief things that at the end of the day you are going to have
 2 to go back and enforce in the Ukraine?
 3 MR. SILLS: Your Honor, there is a fourth heading that
 4 they are also trying to stop. There is a noncompete agreement.
 5 As a condition of being allowed to buy in, Alfa agreed not to
 6 compete, in effect, with the joint venture.
 7 Then they went ahead and they bought prohibited
 8 interest in another cell phone company in Ukraine.
 9 THE COURT: That is also in the Ukraine.
 10 MR. SILLS: But, your Honor, that would be subject to
 11 a damage remedy that we could enforce anywhere in the world
 12 against Alfa.
 13 This is the primary jurisdiction. As a matter of --
 14 we could win an award, reduce it to a judgment here, confirming
 15 it under the Arbitration Act. If they don't comply with that
 16 in Ukraine, we could seek judgment of contempt here. Because
 17 that is a degree of specific performance which would give us a
 18 right to money damages, which we could seek to enforce in the
 19 Ukraine.
 20 THE COURT: So conceivably there are benefits.
 21 MR. SILLS: I think they are important benefits.
 22 Your Honor, Ukraine has only been independent for 15
 23 years. As I am sure you know from recent newspaper accounts,
 24 it has an extremely volatile political and legal system. It is
 25 not clear which way it is moving.
 SOUTHERN DISTRICT REPORTERS, P. C.
 (212) 805-0300

21

6BFHSTOA

1 Once this is resolved -- and a judgment, after all, is
 2 good for a long time. It may well be that Ukraine will enforce
 3 it. We believe Ukraine will enforce it now.
 4 Ukraine, for example, has adopted the UNCITRAL model
 5 law on international commercial arbitration, and under the
 6 express terms of that law a judgment in New York would be
 7 enforceable, or an award in New York would be enforceable in
 8 Ukraine.
 9 THE COURT: In general terms. It is a little hard to
 10 expect that it is going to be enforced by courts that have said
 11 that, in effect, the arbitration clause is null and void.
 12 MR. SILLS: Well, your Honor, turning to that point.
 13 Your Honor, that is nothing but a collusive lawsuit.
 14 Al pren --
 15 THE COURT: The thought crossed my mind, but this
 16 lawsuit was brought by Al pren against Storm, and Al pren owns
 17 Storm.
 18 MR. SILLS: It was brought, in effect, by Storm
 19 against itself, your Honor. Storm has no operations. It
 20 describes itself publicly as a holding company.
 21 So what happened here? We commenced, frustrated with
 22 the inability to negotiate with Alfa, this arbitration in early
 23 February of this year.

11-15-06 Transcript.txt

24 In April, without notice to us, Storm arranged to have
25 itself sued by its corporate parent, and representing Alpen,
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

22

6BFHSTOA

1 the parent in that case, was a lawyer who usually represents
2 Storm. Storm didn't have a lawyer. It sent its general
3 director, a Russian businessman, Ukrainian businessman, to
4 represent it, although he chose not to put in any written
5 defense. And of course in civil law jurisdiction, written
6 presentations really are at the heart of any corporate
7 presentation.
8 Despite what Mr. Van Tol said, there wasn't much of an
9 argument. Apparently, Mr. Klymenko, the businessman who chose
10 to represent himself, mentioned the fact that there was an
11 arbitration proceeding in New York and didn't attempt to defend
12 the fact that Mr. Nilov, the general director, had signed this
13 agreement, that there had been an earlier general meeting of
14 participants, and there is a complicated history to this, and
15 it's been the subject of two separate evidentiary proceedings
16 before the arbitrators.

17 THE COURT: I understand that. We will get back to
18 that in a minute.

19 So what happens in Ukraine, at least this was the view
20 of the arbitration panel, is that Storm does not attempt to
21 argue severability.

22 MR. SILLS: Not only do they not attempt to, they
23 don't even mention it, your Honor.

24 Leaping ahead for one moment with this, after the
25 arbitrators, after three hearings, ruled that indeed they have
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

23

6BFHSTOA

1 jurisdiction to proceed, not even Alpen, the supposed
2 plaintiff in that case, but Storm, the supposed defendant, goes
3 back and asks for a clarification, in effect asking for a
4 ruling against itself -- again, without notice to us -- and
5 gets this absurd ruling, holding that there is no severability
6 after the arbitrators had addressed this.

7 THE COURT: You agree that the second most recent -- I
8 don't know if second is the right word, but this November 8,
9 2006 ruling does address severability, which is the issue that
10 the arbitrators hung their hat on and said was not addressed in
11 the earlier Ukrainian judgments.

12 MR. SILLS: Well, it addresses it, your Honor, but,
13 again, in this proceeding, to which not only were we strangers
14 but of which we had no knowledge, what happened is after this
15 trial court decision that Storm had arranged against itself,
16 they purported to take an appeal. Again, without notice to us.
17 We found out about this case through a press release. This
18 then became the centerpiece of the motion to dismiss that Storm
19 had made before the arbitrators.

20 THE COURT: Is Mr. Van Tol right, though, that you
21 could have intervened at some stage in the appeal, and the
22 significance of that being that if you had, then presumably you
23 would have gotten notice if you were a party?

24 MR. SILLS: Your Honor, I'm not a Ukrainian lawyer and
25 I don't know the answer. From speaking with Ukrainian counsel,
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

24

11-15-06 Transcript.txt

6BFHST0A

1 my understanding is that intervention at the appellate stage
 2 would be roughly analogous to intervention at the appellate
 3 stage in the United States. That is, you would take the
 4 record, such as it is, as you find it.

5 But the more important point, I think, your Honor,
 6 under Parklane Hosiery and thousands of case that have followed
 7 it, a party cannot be bound by a judgment in an action to which
 8 it was not itself a party. The fact that you could have
 9 intervened in theory, and I don't think much turns on this
 10 Ukrainian doctrine of intervention because New York law governs
 11 under the express terms of the shareholders' agreement, is that
 12 it is meaningless. This is what the Supreme Court said in
 13 Chase National Bank v. City of Norwalk.

14 THE COURT: Let me try and focus on what I guess is a
 15 choice of law question. I am hardly an expert on arbitration,
 16 but I did get the opportunity to pick up the most recent
 17 Supreme Court decision that seems relevant, which is Buckeye
 18 Check Cashing.

19 The Supreme Court says -- and this is sort of what I
 20 take to be the American law about who decides arbitrability,
 21 who decides the validity of the arbitration clause. The
 22 Supreme Court says that that is generally going to be for the
 23 arbitrators, and that is a separate question than the question
 24 of the legality of the contract as a whole. But then there is
 25 a suggestion that this all turns on the applicable state law as

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

25

6BFHST0A

1 to whether the arbitration clause is severable.

2 Do I have that right?

3 MR. SILLS: I think, with all respect, your Honor, yes
 4 and no.

5 THE COURT: That is wrong because this is an
 6 international arbitration, or that is wrong because --

7 MR. SILLS: No, your Honor. It is because the missing
 8 piece of the puzzle is the Supreme Court's decision in Prime
 9 Options of Chicago.

10 THE COURT: OK.

11 MR. SILLS: Ordinarily, under the Steel Workers
 12 trilogy, your Honor, there are strong presumptions in favor of
 13 arbitrability, with the exception, as a general rule, as your
 14 Honor says, that the question of whether or not the contract --
 15 there is an agreement to arbitrate will ordinarily be given to
 16 a court. That is simply a presumption based into the law.

17 But what Prime Options of Chicago holds, your Honor,
 18 is that the parties can by contract vary that. The parties can
 19 agree that the arbitrators will be the judges of their own
 20 jurisdiction. Because arbitration is simply, as you say, a
 21 matter of contract, and contract is ordinarily a matter of
 22 state law, we would look to state law to determine that.

23 Under New York law, which governs here, both because
 24 the arbitration is pending here and because the parties
 25 concerned about the application of Ukrainian law opted for a

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

26

6BFHST0A

1 New York forum and for New York law to govern. New York law
 2 incorporates federal law on the question of severability and
 3 arbitrability. The most recent case on that is the decision of
 4 the First Department in Weiner Malkin, which I believe is a

11-15-06 Transcript.txt

5 2004 case, your Honor. So that the Federal Arbitration Act,
6 including the special provisions relating to international
7 arbitration found in Chapter 2, are part of New York law, and
8 there is no difference between New York law and federal law on
9 that point. So it is, in effect, a false conflict.
10 Now in order to agree, the parties have to either put
11 in express language in their contract or, as the Second Circuit
12 held in the Contec case, the parties by incorporating
13 arbitration rules that have a severability provision in them
14 agree as surely as if they had put those provisions in
15 expressly.
16 Here, the parties look to the UNCITRAL. Article 21 of
17 the UNCITRAL rules say this: The arbitrable tribunal shall
18 have the power to rule on objections that it has no
19 jurisdiction, including any objections with respect to the
20 existence or validity of the arbitration clause or of the
21 separate arbitration agreement.
22 Then it goes on to say: The arbitral tribunal shall
23 have the power to determine the existence or the validity of
24 the contract of which a arbitration clause forms a part.
25 For the purposes of Article 21, an arbitration clause

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

27

6BFHST0A

1 which forms part of a contract and which provides for
2 arbitration under these rules, as this one does, shall be
3 treated as an agreement independent of the other terms of the
4 contract. A decision by the arbitral tribunal that the
5 contract is null and void shall not entail ipso jure the
6 invalidity of the arbitration clause.
7 So conceptually, your Honor, what that means is, even
8 though it is physically one piece of paper, the shareholders'
9 agreement is really two separate contracts.
10 As the arbitrators found in this case, and as they
11 found correctly, there is no doubt that Mr. Nilov, as the
12 general director of this Ukrainian LLC, Storm, had the
13 authority to enter into a separate arbitration agreement. That
14 is really the only question that was before the tribunal and it
15 is really the only question that is here.
16 If Mr. Nilov had signed two pieces of paper, one
17 called shareholders' agreement and one called arbitration
18 agreement, even given this, and I have to say, your Honor --
19 THE COURT: So point one, as you see it, is whether
20 the arbitration agreement is severable and separately valid,
21 and that goes to the arbitrators under New York and federal
22 law. Then, of course, you are going to go next, in December,
23 to the arbitrators and tell them that in fact they should
24 enforce the shareholders' agreement and that the shareholders'
25 agreement is valid and enforceable.

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

28

6BFHST0A

1 MR. SILLS: That is exactly right, your Honor.
2 THE COURT: I don't know who is going to argue what
3 Ukrainian law in the abstract has to say about that. But I
4 take it what you are also saying is that whatever went on in
5 Kyiv, while it may or may not be persuasive about what
6 Ukrainian law is, an issue that you think should be decided by
7 the arbitrators, it certainly isn't binding on you as any kind
8 of collateral estoppel. The fact that this declaration
9 occurred in connection with the same subject matter as the

11-15-06 Transcript.txt

10 arbitration is largely irrelevant because there is no res
 11 judicata or collateral estoppel or other effect of this on your
 12 action in New York.

13 MR. SILLS: Precisely, your Honor, any more than if we
 14 arranged to be sued by Telenor Mobile Holdings, our corporate
 15 parent, in a court in Oslo for a declaration that this was
 16 enforceable. I would be here saying that they were bound.

17 THE COURT: Whether or not it is collusive is actually
 18 not the key thing here.

19 The key thing is, you are just not there, and since
 20 you are not there, you are not bound by the judgment. Then
 21 once we are past that issue, this is just a piece of evidence
 22 that is relevant, perhaps, to the question of what Ukrainian
 23 law is on any of these subjects.

24 MR. SILLS: But, as your Honor says, those are
 25 questions for the arbitrator. Those are questions that the

SOUTHERN DISTRICT REPORTERS, P. C.

(212) 805-0300

29

6BFHST0A

1 parties committed to the arbitrators when they signed the
 2 shareholders' agreement.

3 THE COURT: Let me get back to Mr. Van Tol on this.

4 MR. VAN TOL: Yes, your Honor.

5 THE COURT: This is all very interesting what went on
 6 in Kyiv and whether it is collusive or whatever else anybody
 7 has to say and whether or not you are the big bad wolf, but the
 8 key issue here, it seems to me, is that if Telenor isn't
 9 present, then this judgment doesn't bind them.

10 You are not saying it does, are you?

11 MR. VAN TOL: Your Honor, there are a couple of things
 12 there. There is, in fact, case law that a nonparty to an
 13 arbitration can be bound by findings in an arbitration, and
 14 that can be imparted to a New York court. I would submit that
 15 the findings in and conclusions of a Ukrainian court on a
 16 Ukrainian law issue is something that the arbitration tribunal
 17 here should have given recognition to.

18 In other words, New York law says, if you've got a
 19 judgment that comes from abroad and you can't show that there
 20 was a failure of due process, that it is against public policy
 21 grounds or there was fraud in the procurement of the judgment,
 22 under New York law you must follow that order.

23 What I note, your Honor --

24 THE COURT: Again, putting aside any question that you
 25 basically sue yourself in Kyiv. If some other guy sued you in

SOUTHERN DISTRICT REPORTERS, P. C.

(212) 805-0300

30

6BFHST0A

1 Kyiv, but not Telenor, and the Kyiv court says, here's what we
 2 think about this contract: That is interesting and it may be
 3 due some deference or some consideration when the time comes to
 4 consider what is Ukrainian law as a matter of precedent, the
 5 same as if two total strangers sued each other and got some
 6 answer about a question of law. But it is really just
 7 theoretically irrelevant and coincidental that it happens to be
 8 a judgment about the subject matter of this arbitration because
 9 unless Telenor is there, I don't see how they're bound by it or
 10 how the arbitration panel is bound by it other than as some
 11 evidence of what Ukrainian law is.

12 MR. VAN TOL: And, your Honor, there are a couple of
 13 points there. One is that Telenor Mobile has never shown that
 14 they could not have intervened. This is not some agreement

11-15-06 Transcript.txt

15 that is tangential; it is the very agreement on which the
16 arbitration is based.
17 THE COURT: Right. They didn't have notice when the
18 case started, right?
19 MR. VAN TOL: They did not, your Honor. They are not
20 entitled to notice under Ukrainian law.
21 THE COURT: Whether they are entitled under Ukrainian
22 law, it is you who are the party to that proceeding and you
23 could have told them.
24 MR. VAN TOL: Yes, your Honor.
25 THE COURT: And you didn't.
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

31

6BFHSTOA

1 MR. VAN TOL: We did not under advice of Ukrainian
2 counsel.
3 THE COURT: Advice of Ukrainian counsel that this
4 would be like Swiss bank secrecy. That is Ukrainian court
5 secrecy, that you are not allowed to tell other parties to your
6 contracts that there is litigation going on.
7 MR. VAN TOL: Your Honor, I have to add, though --
8 this was left out of Mr. Sills' presentation -- Mr. Sills'
9 client, Telenor Mobile, went back to the Ukrainian court on
10 another related matter, obtained a clarification order similar
11 to what we did without notice to us. We were actually a party
12 to that case.
13 THE COURT: So they are bad, too. That doesn't bother
14 me. I am not concerned about clean hands here. I am concerned
15 about the effect that should be given to this ruling.
16 You are saying maybe they are kind of collaterally
17 estopped or something like that because they could have
18 intervened. It seems to me what is happening here is they
19 couldn't have intervened because they didn't have actual notice
20 in time to get into the trial court rulings. While they could
21 have intervened at the Court of Appeals stage, they are kind of
22 stuck, at least if appellate litigation in the Ukraine is like
23 that in the United States. I don't know whether it is. Maybe
24 there is some de novo proceeding over there. I don't know.
25 But at least if it is analogous to American procedure,
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

32

6BFHSTOA

1 intervening at the appellate stage, when the record is already
2 fixed, in a lawsuit in which there was no real adversary
3 proceeding, is kind of not a very good option.
4 MR. VAN TOL: Your Honor, you did raise an earlier
5 point that I wanted to return to when you said is the tribunal
6 supposed to take this as evidence of what Ukrainian law is.
7 Yes, they are.
8 We have to revert back to the --
9 THE COURT: But as conclusive evidence or just one
10 among a number of things that might be relevant in the
11 analysis?
12 MR. VAN TOL: Your Honor, Sphere Drake says, if a
13 party, as in my client, is attacking the validity of a
14 contract, what we need to do is come up with some evidence that
15 the contract is not valid. What is better "some evidence" than
16 the fact that a Ukrainian court said this agreement doesn't
17 exist.
18 Then what we do is we come to you, your Honor, and
19 say, now that we have passed that some evidence threshold, the

11-15-06 Transcript.txt

20 determination of what effect is given to the Ukrainian court,
 21 all these issues we are discussing now, is decided by you.
 22 We are not here today to talk about the ultimate
 23 merits of who is right and who is wrong.
 24 THE COURT: Yes, you are, because you can't just come
 25 in here and say enjoin the arbitration. There has to be some
 SOUTHERN DISTRICT REPORTERS, P. C.

(212) 805-0300

33

6BFHST0A

1 showing that you are likely to win.
 2 MR. VAN TOL: Yes, your Honor. That likelihood is
 3 that we have got an enforceable judgment from a Ukrainian
 4 court, that I note the arbitration panel never questioned.
 5 They said the procedures in the Ukraine, as far as they could
 6 tell, were fine.
 7 They took a lot more evidence than we have had today,
 8 and they had no trouble with Ukrainian procedures.
 9 THE COURT: Then they went and disregarded it.
 10 MR. VAN TOL: Exactly, your Honor. That is why we are
 11 here.
 12 THE COURT: With all due respect nod to the Ukrainian
 13 court, they are not saying the Ukrainian court did anything
 14 wrong. That is a little different than saying that they have
 15 to respect the outcome of a suit in which the Ukrainian court
 16 is presented with no adversarial issues, where the party that
 17 would like to undue the arbitration is basically suing itself.
 18 MR. VAN TOL: Your Honor, there are actually two
 19 things going on here. The ultimate merits here are broken into
 20 two separate issues. There is the ultimate merits as in, when
 21 we move for summary judgment how will you as the court treat
 22 the Ukrainian award. Before you get there, there are merits on
 23 whether or not we are in the right jurisdiction.
 24 In other words, we told the arbitration tribunal two
 25 things. We said, you have to follow Sphere Drake and the some
 SOUTHERN DISTRICT REPORTERS, P. C.

(212) 805-0300

34

6BFHST0A

1 evidence standard. They disregarded that. We said, you have
 2 to follow New York law on honoring a Ukrainian judgment. They
 3 disregarded that. So the merits that are really before your
 4 Honor are, what is the likelihood of success on those issues.
 5 Of course, we will then come to you on the ultimate
 6 issues of whether or not we win ultimately on the enforcement
 7 of the Ukrainian judgment.
 8 THE COURT: But what you are doing here is you are
 9 coming and asking me to enjoin the arbitration because the
 10 arbitration clause is ultimately not valid. The first thing
 11 you want to do is argue that the arbitration panel should
 12 have -- I take what you are saying is what they should have
 13 done in this ruling is say, well, we may have our views on the
 14 arbitrability of this, but we should wait and defer that issue
 15 to a court.
 16 MR. VAN TOL: Yes, your Honor.
 17 THE COURT: If it goes to a court, though, and the
 18 court is not very impressed with the argument that the
 19 arbitration clause is invalid, then aren't we just engaged in a
 20 process of delay to say that the arbitration should be
 21 enjoined. Because the court needs to first decide the question
 22 of arbitrability and, therefore, you get to not even address
 23 the question of how the court should decide that, and you don't
 24 have to show that the court is likely to agree with you about

11-15-06 Transcript.txt

25 arbitrarility. All you need to show is that the court should
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

35

6BFHST0A

1 decide this in the first instance, and then everything should
2 stop while we engage in this discussion, and I should be
3 entirely agnostic as to how that discussion could come out and
4 I shouldn't consider whether you are likely to win that. That
5 is your position.

6 MR. VAN TOL: It is, your Honor, although we strongly
7 believe we will win, which is why we will move for summary
8 judgment.

9 Why we are here today on both the TRO and the
10 preliminary injunction is really going back to the question
11 your Honor asked Mr. Sills, which was, where is the fire.

12 What Mr. Sills told you is that they have several
13 grounds for injunctive relief and also monetary damages. Well,
14 I would submit that those two things really are damning for
15 them in two ways.

16 One, if there was such urgency attached to this need
17 to get an order from the tribunal that Storm has to attend
18 shareholder meetings, why didn't they get an injunction in the
19 intervening time since February? Our contract says that in aid
20 of arbitration you may go to a court and get a provisional
21 remedy. They could have sought an injunction either from the
22 tribunal or from the court ordering Storm to attend the
23 meetings if it really is as urgent as Mr. Sills posits.

24 The second point is, they are asking for damages. The
25 cases we have cited you are quite clear that where there is an
SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

36

6BFHST0A

1 arbitration and someone seeking damages and you issue an
2 injunction, Mr. Sills and his client are harmed, they may
3 collect whatever harm they suffered in the arbitration.

4 That is really why we are here, your Honor. We are
5 happy to talk about the merits, but today is, do we need to go
6 forward, file briefs on the 29th, do witness statements on the
7 22nd, engage in a hearing on December 7th that may end up being
8 a nullity under Ukrainian law, where it is surely going to have
9 to be enforced at least in part.

10 THE COURT: Well, that may or may not be foolish on
11 their part, but I don't see why it affects this issue.

12 If they are pursuing an arbitration award that they
13 are not going to be able to enforce, well, so be it. The
14 question is whether there is jurisdiction in the arbitration
15 panel.

16 I note that you folks didn't come running to court in
17 the first place and try to enjoin the arbitration; you
18 submitted this very issue to the arbitration panel.

19 MR. VAN TOL: We did, your Honor. Absolutely. The
20 reason we did is because -- Mr. Sills cited Article 21 of the
21 UNCITRAL rules. All it says is if you've got a jurisdictional
22 objection, in the first instance go to the arbitration
23 tribunal. It doesn't say the arbitration tribunal may do as it
24 pleases. I argued to the arbitration tribunal, I agree that is
25 why we are here, but I would like to you decide the issue under

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

37

6BFHST0A

11-15-06 Transcript.txt

1 Sphere Drake, and they disregarded it.

2 To your Honor's other point about whether Mr. Sills
3 can foolishly go ahead and get an award, well, I have enough
4 confidence in my case to believe that I might win the
5 arbitration as well. I want to make sure that any award I get
6 is valid under Ukrainian law or wherever I want to enforce it.

7 So all we are asking your Honor to do is, there has
8 been no showing that there is any urgency about December 7th,
9 put it off so we may have your Honor decide whether we argue it
10 before you or we go back to the arbitration panel.

11 I have no trouble going back to the arbitration panel
12 with my arguments. I just want to make sure I am in the right
13 place.

14 THE COURT: Mr. Sills.

15 MR. SILLS: Your Honor, there are two points I would
16 like to address. The fact is, this is the fourth application
17 for a stay we have seen since September in this case. As soon
18 as the dam broke, as soon as the arbitrators ruled that they
19 did have jurisdiction and that the case would be going forward
20 and directed the parties to cooperate, even at that point we
21 couldn't get a schedule in place.

22 Documents are due tomorrow under the stipulated
23 discovery schedule that Mr. -- I'm sorry. They are due today
24 under the stipulated discovery schedule. I think it is fairly
25 obvious why we are seeing this last-minute application.

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

38

6BFHSTOA

1 Your Honor, very briefly. We haven't talked about the
2 standard of review or, for that matter, whether this is a
3 reviewable order at all.

4 As your Honor is well aware, great deference is paid
5 to the decisions of arbitrators in general, particularly great
6 deference is paid to the decisions of arbitrators in
7 international cases. Listening to Mr. Van Tol's presentation,
8 he is essentially complaining that there was an evidentiary
9 mistake at an interim stage of an arbitration.

10 The rule in this circuit, your Honor, set forth in
11 Michael's v. Mari forum Shipping -- the citation is 624 F.2d
12 411 -- a case that has been cited dozens, if not hundreds, of
13 times, is this: Under the Federal Arbitration Act, a district
14 court does not have the power to review an interlocutory ruling
15 by an arbitration panel. It goes on to say: As we stated in
16 Campagna v. Panamanian Maritima, a district court should not hold
17 itself open as an appellate tribunal during an ongoing
18 arbitration proceeding; its application for interlocutory
19 relief results only in a waste of time, the interruption of the
20 arbitration proceeding, and delaying tactics in a proceeding
21 that is supposed to produce a speedy decision.

22 THE COURT: I had a little bit of that reaction just
23 reading the plaintiff's briefs. It may be bringing the
24 erroneous focus I suppose of American appellate procedure,
25 which isn't quite analogous to what is going on here.

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300

39

6BFHSTOA

1 You don't normally get to go to the Court of Appeals
2 because the district court has said it has jurisdiction. The
3 case gets decided and then you appeal. That is normally what
4 happens. They had an interlocutory appeal on this. Indeed,
5 they kept referring to this as an award. Until I went back and

11-15-06 Transcript.txt

6 looked and saw that is exactly the way the arbitration panel
 7 characterized what it was doing, as a partial final award
 8 regarding jurisdiction, and they did cite -- I haven't read it,
 9 but they cited a case which sounded as if it was Judge Buchwald
 10 doing something just like what they are asking me to do.

11 MR. VAN TOL: Yes, your Honor. The Tellium case, your
 12 Honor.

13 MR. SILLS: Your Honor, the context is so different.
 14 Your Honor, the rule is the rule of Mari forum. The analogy
 15 your Honor draws is exactly the same as the right one. In
 16 fact, under Section 16 of the Arbitration Act, a decision by a
 17 district court to hold an arbitration is immediately appealable
 18 because of the favored position of arbitration in our legal
 19 system. But a decision by a district court to compel
 20 arbitration is not an appealable order under Section 16.

21 What is happening here, your Honor, is we can't be in
 22 a position where every time this arbitrable tribunal -- and it
 23 has been like pulling teeth to get a hearing schedule so we can
 24 get the relief we are entitled to. Every time Mr. Van Tol is
 25 unhappy about some evidentiary ruling or because his theory on

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

40

6BFHSTOA

1 choice of law hasn't been adopted -- I think it is a meritless
 2 theory, but it is a complex theory he seems to have
 3 constructed. At the end of the case, it is all brought up for
 4 a review in accordance with Section 10 of the Arbitration Act
 5 and in accordance with the provisions of Chapter 2 of the
 6 Arbitration Act.

7 Under Chapter 2, your Honor, the manifest disregard of
 8 the law, which is a judge-made basis for upsetting an
 9 arbitration award that they rely on, is not applicable under
 10 Chapter 2. So I don't think as an interlocutory order of an
 11 arbitrable tribunal it is reviewable at all.

12 If there was some way to thread the needle and make it
 13 reviewable, it is still subject to the deference which is due
 14 to an arbitration panel. Here, we have an interim order. The
 15 complaint is about an evidentiary ruling. This claim they have
 16 got is preserved for review on a final award. The case ought
 17 to finally be allowed to go forward and the company Kyivstar
 18 ought to be put right side up, your Honor.

19 THE COURT: The plaintiff here is seeking a
 20 preliminary injunction. What brings us here this morning is
 21 simply a request, originally made ex parte to me yesterday, for
 22 a temporary restraining order that would block the arbitration
 23 from going forward while we sort this out and while you get the
 24 opportunity to brief the preliminary injunction issues. As
 25 ably as you have presented the issues this morning, of course I

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

41

6BFHSTOA

1 have not had the benefit of your side of this in writing.

2 I think one question that I need to get clear in my
 3 mind is what is going to happen next. Whether I sign the TRO
 4 or I don't, we still have to go forward on what I take it is
 5 going to be a very expedited basis to decide the question of
 6 preliminary injunction.

7 Now, in your view, what has to happen in order for me
 8 to decide that?

9 You are going to submit papers. Is there some
 10 evidentiary proceeding that either side contemplates? What do

11-15-06 Transcript.txt

11 you think is going to happen on that?
12 MR. SILLS: I can't speak for Mr. Van Tol.
13 THE COURT: I know, but what do you think we have to
14 do?
15 MR. SILLS: We are prepared to proceed on papers and
16 on the record made before the arbitrators.
17 On that point, if a TRO were to be entered, it would
18 completely disrupt the arbitration.
19 THE COURT: I didn't ask you that. I asked you what
20 do we have to do to decide the preliminary injunction and how
21 fast can that happen.
22 MR. SILLS: We can do it on papers, your Honor. We
23 can do it as fast as your Honor requests.
24 THE COURT: You can get me papers very rapidly.
25 In terms of what I have before me, you referred to the
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

42

6BFHST0A
1 record that was before the arbitrators. I haven't plowed
2 through all of these exhibits. Do I have already the
3 transcripts?
4 Here, I am just trying to judge bulk. These two fat
5 volumes. Does this include everything there is or do you have
6 more stuff that you are going to have to get me?
7 MR. SILLS: I believe, your Honor, what has been
8 submitted to you by the plaintiff is the three transcripts that
9 were made before the arbitrators but not all the exhibits that
10 were submitted. But those we each have copies of.
11 THE COURT: It will be quick enough to get it to me,
12 but it will add to what I need to see.
13 MR. SILLS: Unfortunately, it will, your Honor.
14 THE COURT: Mr. Van Tol, what do you contemplate
15 happening before the preliminary injunction issues can be
16 decided?
17 MR. VAN TOL: Your Honor, I agree with Mr. Sills that
18 I don't see a need for an evidentiary hearing, and we are happy
19 to have it submitted on papers.
20 I think time is of the essence. If Mr. Sills puts in
21 papers and we have a hearing very quickly, say on Monday, we
22 are willing to waive the right to put in reply papers. Because
23 I think this is going to be something we can brief and argue
24 for your Honor. You have a clear grasp of the issues and I
25 don't want to burden the record with a reply. We are happy to
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

43

6BFHST0A
1 move forward very quickly.
2 THE COURT: You have your papers in already.
3 MR. VAN TOL: Yes, your Honor.
4 THE COURT: And you don't need a reply.
5 You are going to get me your papers, Mr. Sills, by
6 when?
7 MR. SILLS: Your Honor, as Mr. Van Tol knows, there is
8 another arbitration that at their insistence is being held in
9 London on Monday and Tuesday between these same two parties and
10 I have to be there. We could argue it on the Wednesday before
11 Thanksgiving.
12 THE COURT: He doesn't have to be there.
13 MR. SILLS: I believe another of his partners is going
14 to be there.
15 THE COURT: The question is, when are you going to get

11-15-06 Transcript.txt

16 me your papers?

17 MR. SILLS: We could have them to you Friday, your
18 Honor.

19 THE COURT: OK. You get me the papers on Friday and
20 you are going to arrive here hung over and jet lagged from
21 London to argue on Wednesday morning. That is very brave.

22 MR. VAN TOL: That is where I came from yesterday,
23 your Honor, in my defense.

24 THE COURT: I guess everybody has that problem.
25 Why don't we do it 10:00 on Wednesday morning. Is
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

44

6BFHST0A

1 that doable?

2 MR. VAN TOL: That works for Storm, your Honor. Thank
3 you.

4 THE COURT: So you get me the papers on Friday for the
5 defendant. We will do this on Wednesday morning. I am not
6 going to sign the TRO. I think that it doesn't sound like --
7 there is discovery to be provided, but it sounds like these
8 people are litigating in several arbitrations in several courts
9 in at least three countries that we have now heard of.

10 It is a little hard for me to see that there is any
11 irreparable anything that is imposed on the plaintiff to
12 provide that discovery or do anything that is going to take
13 place between now and next Wednesday. So far I am not
14 persuaded that this is a matter that is going to require the
15 court to intervene.

16 Now, it may turn out to be entirely different once I
17 have had the opportunity to review all of these issues, and I
18 am not trying to forecast how I am going to rule on the
19 preliminary injunction issue when it is finally fully briefed
20 and argued, but at this moment I see neither an urgency to stop
21 anything that is going on or enough likelihood that plaintiff
22 is going to prevail that I ought to stop everything in its
23 tracks.

24 If we do get this matter put before me fully by next
25 Wednesday, then I am anticipating being able to rule on
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

45

6BFHST0A

1 Wednesday. If the plaintiff prevails on the preliminary
2 injunction, then that is plenty of time to stop the arbitration
3 scheduled for December 7th and 8th. If they don't, then we
4 will not have disrupted whatever is going on in preparation for
5 that.

6 So I think the prudent course is to not enter any
7 orders at this time, to leave things where they lie, and then
8 try to resolve the preliminary injunction issue as rapidly as
9 possible based on as full a record as the parties can put
10 before me.

11 So I think that is the ruling.

12 Thank you very much for a very enlightening argument.
13 (Adjourned)

14
15
16
17
18
19
20

11-15-06 Transcript.txt

21
22
23
24
25

SOUTHERN DISTRICT REPORTERS, P. C.
(212) 805-0300